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MICROSOFT CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

INTRAX GROUP, INC., d/b/a, SURPLUS
COMPUTERS, a California corporation;
MICHAEL MAK, an individual; and JOHN
DOES 1-5,

Defendants.

No. 07-CV-01840-CW

PLAINTIFF MICROSOFT
CORPORATION'S NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

Date: August 14, 2008
Time: 2:00 p.m.
Before: Hon. Claudia Wilken
Location: Courtroom 2, 4th Floor

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that pursuant to Federal Rule of Civil Procedure 56 and Civil Local Rules 7-2 and 56-1, plaintiff Microsoft Corporation ("Microsoft") will move, and hereby does move, for summary judgment against defendant Michael Mak as to liability on Claims I and II of Microsoft's Complaint in this action (Dkt. # 1). This motion shall be heard on Thursday, August 14, 2008 at 2:00 p.m., before the Honorable Claudia Wilken, in Courtroom 2, 4th Floor, at the United States Courthouse, 1301 Clay Street, Oakland, California.

This motion is brought on the grounds that there is no controversy as to any material fact necessary to prove Michael Mak's liability as to Claims I and II. This motion is based on the supporting Memorandum of Points and Authorities below; the accompanying declarations of Miles Hawkes, Deborah M. Johnson, and Enoch Remick; the June 25, 2008 deposition of Michael Mak and exhibits thereto; the pleadings and documents on file with the Court; any oral argument requested by the Court; and such other matters as to which the Court may take judicial notice.

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rule of Civil Procedure 56, Microsoft seeks summary judgment as to Michael Mak's liability for copyright infringement, 17 U.S.C. § 501, and unauthorized importation of copyrighted works, 17 U.S.C. § 602(a). Microsoft brings this motion on the grounds that there is no genuine issue as to any material fact necessary to prove Michael Mak's liability.

I. INTRODUCTION

Defendant Michael Mak ("Mr. Mak") and his company, Intrax Group, Inc. (d/b/a Surplus Computers) ("Intrax" or "Surplus Computers") (Mak and Intrax collectively are referred to as the "Surplus Computers Defendants") are repeat, high-volume, willful infringers of Microsoft's copyrights. Even after being warned by Microsoft to cease and desist their infringing activities, the Surplus Computers Defendants infringed Microsoft's exclusive right

1 of distribution by selling special Microsoft Student Media software that is licensed for
2 exclusive use by qualified educational users. The Surplus Computers Defendants have also
3 violated Microsoft's right to control importation of its copyrighted works manufactured
4 abroad for exclusive distribution and use abroad, in violation of 17 U.S.C. 602(a), by
5 distributing that software in the United States.

6 By this motion Microsoft seeks summary judgment as to liability on its first and
7 second claims against Mr. Mak.¹

8 II. STATEMENT OF THE ISSUES

9 **A.** Whether Microsoft is entitled to summary judgment as to liability against Mr.
10 Mak for copyright infringement where there is no genuine issue of material fact as to Mr.
11 Mak's distribution of infringing Microsoft Windows XP, Office 2003, and Office XP Student
12 Media software (in addition Student Media for other copyrighted Microsoft works), to which
13 Microsoft has exclusive copyright ownership and right of distribution, to individuals and
14 entities not qualified to use the software, without approval or authorization from Microsoft.

15 **B.** Whether Microsoft is entitled to summary judgment as to liability against Mr.
16 Mak for infringing importation of copyrighted works where there is no genuine issue of
17 material fact as to Mr. Mak's distribution within the United States of infringing Microsoft
18 Windows XP, Office 2003, and Office XP Student Media software (in addition to Student
19 Media for other copyrighted Microsoft works) that was manufactured and licensed for
20 exclusive distribution and use outside of the United States, without approval or authorization
21 from Microsoft.
22
23
24
25
26

27 ¹ In September of 2007, Intrax filed a Chapter 11 Bankruptcy Petition. Declaration of Deborah M. Johnson
28 ("Johnson Decl.") ¶ 4. Intrax's bankruptcy proceedings remain pending and, because the automatic bankruptcy
stay applies to Intrax in this matter, Microsoft is *not* seeking summary judgment against Intrax by this motion.

III. FACTS

A. Copyrighted Microsoft Software.

Microsoft develops, markets, distributes, and licenses computer software programs, including such programs as Microsoft Windows XP, Microsoft Office 2003, and Microsoft Office XP (among other programs) that are the subject of this action for copyright infringement. *See* Declaration of Miles Hawkes (“Hawkes Decl.”) ¶ 15; Complaint ¶¶ 14-15. Microsoft’s software products are packaged and distributed with associated proprietary materials such as user’s guides and manuals, end-user license agreements, Certificates of Authenticity (“COAs”), and other components. Microsoft holds valid copyrights in its software programs, including Microsoft Windows XP, Microsoft Office 2003, Microsoft Office XP, and other software described in this motion, which are duly and properly registered with the United States Copyright Office. Hawkes Decl. ¶ 15.

B. Microsoft Student Media Software.

Microsoft offers Student Media software through special academic licensing programs at prices roughly equivalent to Microsoft’s manufacturing and transportation costs, which amounts to a discount in excess of 90% off the regular retail price. Declaration of Enoch Remick (“Remick Decl.”) ¶ 5. Student Media was created to provide low cost software to qualified educational institutions for use by their students, faculty, and staff. *Id.* Microsoft distributes Student Media software at a steep discount to provide students in the United States, in developing nations, and worldwide low cost access to the latest software technology and information in furtherance of the students’ educational development. *Id.*

Pursuant to the terms of Microsoft’s licensing agreements and policies, Microsoft Student Media is subject to significant restrictions regarding use and distribution. *Id.* The Student Media program is intended only for qualified educational users, and the license agreements under which such software media is distributed restrict its distribution to those qualified educational users. *Id.* Additionally, in the United States Student Media may be distributed only by Authorized Education Resellers (“AERs”), who are permitted to distribute

1 Student Media software only to qualified educational users. *Id.* ¶ 6. Academic institutions
 2 and students are prohibited from redistributing Student Media software because the programs
 3 through which Student Media is distributed are intentionally designed to provide low cost
 4 software to qualified educational users, and not the general public. *Id.* Microsoft Student
 5 Media is marked clearly with the following copyright warning:

6 All use subject to volume license agreement. Do not make illegal copies of
 7 this disc. **Not for retail or OEM Distribution. Not for resale.**

8 *Id.* ¶ 9 & Ex. 1 (emphasis in original).

9 As part of Microsoft's international licensing and distribution programs, Microsoft
 10 also imposes geographic restrictions on the distribution of Microsoft products, including
 11 Student Media software. *Id.* ¶ 7. For example, Student Media software distributed to Europe,
 12 the Middle East, or Africa, is not licensed for distribution or use in North America. *Id.*

13 A search of Microsoft's database listing all AERs indicated that none of the Surplus
 14 Computers Defendants is an AER, or otherwise authorized to distribute Student Media in the
 15 United States. *Id.* ¶ 10. Moreover, none of the Surplus Computers Defendants' known
 16 suppliers of Microsoft Student Media is an AER. *Id.* Similarly, none of the Surplus
 17 Computers Defendants or their suppliers is authorized by Microsoft to import to the United
 18 States Microsoft software licensed for distribution outside the United States. *Id.*

19 **C. The Surplus Computers Defendants' Infringement Of Microsoft's Copyrights.**

20 The record here reflects the Surplus Computers Defendants' – and Mr. Mak's own –
 21 repeated infringement of and disregard for Microsoft's rights under the Copyright Act, even
 22 after being warned by Microsoft to cease and desist the infringing conduct.

23 **1. Test Purchases And Warnings.**

24 Microsoft makes controlled test purchases of suspect software products. Hawkes
 25 Decl. ¶ 5. The acquired evidence is formally analyzed by Microsoft product identification
 26 experts to determine if the software and components are genuine, counterfeit, or otherwise
 27 infringing upon Microsoft's intellectual property rights. *Id.*
 28

1 On April 10, 2006, an investigator ordered one unit of Microsoft Office 2003 from the
 2 Surplus Computers Defendants through their website www.surpluscomputers.com. *Id.* ¶ 8.
 3 The software (CD-ROM) was received on April 14, 2006, and was subsequently analyzed by
 4 a Microsoft software identification specialist who determined that it was infringing Microsoft
 5 Student Media software. *Id.* It was further determined to have been manufactured in Ireland,
 6 and not licensed for distribution or use in the United States. *Id.*

7 On September 26, 2006, an investigator ordered one unit of Microsoft Windows XP
 8 and one unit of Office 2003 from the Surplus Computers Defendants through their website
 9 www.surpluscomputers.com *Id.* ¶ 9. The software (CD-ROM) was received on October 2,
 10 2006, and was subsequently analyzed by a Microsoft software identification specialist who
 11 determined that it was infringing Microsoft Student Media software. *Id.* It was further
 12 determined to have been manufactured in Ireland and not licensed for distribution or use in
 13 the United States. *Id.*

14 On November 3, 2006, an investigator ordered one unit of Microsoft Windows XP
 15 from the Surplus Computers Defendants through their website www.surpluscomputers.com.
 16 *Id.* ¶ 10. The software (CD-ROM) was received on November 13, 2006, and was
 17 subsequently analyzed by a Microsoft software identification specialist who determined that it
 18 was infringing Microsoft Student Media software. *Id.* It was further determined to have been
 19 manufactured in Ireland or Germany and not licensed for distribution or use in the United
 20 States. *Id.*

21 On January 3, 2007, Microsoft notified the Surplus Computers Defendants by letter
 22 that Microsoft had analyzed software distributed by them and had identified it as infringing
 23 Student Media.² *Id.* ¶ 11 & Ex. 4. The letter demanded that the Surplus Computers
 24 Defendants immediately cease and desist all infringing activity and warned that Microsoft
 25

26 ² The January 3, 2007 cease and desist letter was not the first time the Surplus Computers Defendants were
 27 warned by Microsoft to stop their infringing distribution of Microsoft products. The Surplus Computer
 28 Defendants received no fewer than *four* prior cease and desist letters, addressed to the Intrax Group Inc. or
 “Software & Stuff,” a “d/b/a” used by the Intrax Group prior to its use of “Surplus Computers.” Hawkes Decl. ¶
 14 & Exs. 7-10; Declaration of Deborah M. Johnson (“Johnson Decl.”) Ex. 1 (Mak Dep. Tr.) at 44:16-22.

1 reserved “the right to seek all available legal remedies without further notice.” *Id.* ¶ 11 & Ex.
2 4.

3 Despite receiving Microsoft’s warning letter, the Surplus Computers Defendants
4 continued to infringe Microsoft’s copyright by distributing Student Media software
5 manufactured and licensed for exclusive distribution to and use by educational users abroad.
6 On January 11, 2007, an investigator ordered one unit of Windows XP and one unit of Office
7 2003 from the Surplus Computers Defendants through their website
8 www.surpluscomputers.com. *Id.* ¶ 12. The software (CD-ROMs) was received on January
9 16, 2007, and was subsequently analyzed by a Microsoft software identification specialist
10 who determined that it was infringing Microsoft Student Media software. *Id.* It was further
11 determined to have been manufactured in Ireland and not licensed for distribution or use in
12 the United States. *Id.*

13 On March 6, 2007, an investigator ordered three units of Office 2003 from the Surplus
14 Computers Defendants through their website www.surpluscomputers.com. *Id.* ¶ 13. The
15 software (CD-ROMs) was received on March 12, 2007, and was subsequently analyzed by a
16 Microsoft software identification specialist who determined that it was infringing Microsoft
17 Student Media software. *Id.* It was further determined to have been manufactured in Ireland
18 and not licensed for distribution or use in the United States. *Id.*

20 **2. Defendants’ Admitted Trafficking In Microsoft Student Media Software.**

21 At a deposition on June 25, 2008, Mr. Mak, Surplus Computers’ President, majority
22 owner, and board member, admitted that the Surplus Computers Defendants bought and sold
23 Microsoft Windows XP, Office 2003, Office XP, Server 2003, and Visio Student Media
24 software.³ Declaration of Deborah M. Johnson (“Johnson Decl.”) Ex. 1 (June 25, 2008
25 Michael Mak Deposition Transcript) (hereinafter “Mak Dep. Tr.”) at 111:12-21; 130:1-3.

26
27 ³ Microsoft Office 2003 and Office XP include a number of additional copyrighted Microsoft software programs,
28 including Access 2003, Excel 2003, Outlook 2003, Business Contact Manager for Microsoft Office Outlook
2003, PowerPoint 2003, Word 2003, InfoPath 2003, Access 2002, Excel 2002, Outlook 2002, PowerPoint 2002,
Word 2002, and FrontPage 2002. Hawkes Decl. ¶ 15.

1 Indeed, based upon records produced by the Intrax Group in a parallel bankruptcy
 2 proceeding,⁴ Mr. Mak admitted that the Surplus Computers Defendants trafficked in **at least**
 3 **2,895 units of Microsoft Student Media software.**⁵ Additionally, Mr. Mak admitted that
 4 the Surplus Computers Defendants trafficked in **at least an additional 1,754 units of**
 5 **Microsoft software** that was “NFR” (not for resale) software, and may have been Student
 6 Media.⁶ Mr. Mak admitted that “the majority” of Microsoft “NFR” software sold by the
 7 Surplus Computers Defendants was Student Media. Mak Dep. Tr. at 131:20-22. By Mr.
 8 Mak’s own admission, the Surplus Computers Defendants “sold Student Media.” *Id.* at
 9 48:20-22; *see also id.* at 51:2-11; 111:22-112:2.

10 At the time he and his company trafficked in and distributed Microsoft Student Media
 11 software, Mr. Mak was aware of the following language on the face of each Student Media
 12 CD-ROM the Surplus Computers Defendants distributed:

13 All use subject to volume license agreement. Do not make
 14 illegal copies of this disc. **Not for retail or OEM**
 15 **Distribution. Not for resale.**

16 *Id.* at 98:7-16. Despite that language, the Surplus Computers never did *anything* to confirm
 17 that their customers were licensed to use Student Media software. *Id.* at 96:12-18. Nor did

18 ⁴ The bankruptcy court presiding over Intrax’s bankruptcy proceedings has ordered Intrax to produce to
 19 Microsoft certain records relating to its distribution of Microsoft products. *See* Johnson Decl. Ex. 2. Intrax has
 20 not yet fully complied with that order, despite the fact that the deadline to produce the records passed months
 21 ago. *See* Johnson Decl. ¶ 4 & Exs. 2-4. Microsoft reserves its right to supplement the record if that forthcoming
 22 discovery reveals additional incidents of Mr. Mak’s infringement of Microsoft’s rights under the Copyright Act.

23 ⁵ These include 396 units of Office 2003, *see* Mak Dep. Tr. at 126:17-23 & Ex. 4 at 346-47, 30 units of Office
 24 XP, *see* Mak Dep. Tr. at 130:1-3 & Ex. 4 at 346-47, 148 units of Office 2003, *see* Mak Dep. Tr. at 133:19-24 &
 25 Ex. 4 at 345, 164 units of Office 2003, *see* Mak Dep. Tr. at 134:25-135:1 & Ex. 4 at 350, 110 units of Office
 26 2003, *see* Mak Dep. Tr. at 135:8-10 & Ex. 4 at 351, 400 units of Office 2003, *see* Mak Dep. Tr. Ex. 4 at 352, 300
 27 units of Office 2003, *see* Mak Dep. Tr. at 139:10-12 & Ex. 4 at 354, 297 units of Office 2003, *see* Mak Dep. Tr.
 28 at 139:13-15 & Ex. 4 at 355, 200 units of Office 2003, *see* Mak Dep. Tr. at 142:4-7 & Ex. 4 at 357, 100 units of
 Office 2003, *see* Mak Dep. Tr. at 142:14-17 & Ex. 4 at 359, 100 units of Office 2003, *see* Mak Dep. Tr. at 146:3-
 19 & Ex. 4 at 501, 300 units of Office 2003, *see* Mak Dep. Tr. at 147:13-17 & Ex. 4 at 618, and 350 units of
 Office 2003, *see* Mak Dep. Tr. at 147:18-22 & Ex. 4 at 621.

⁶ These include 17 units of Server 2003, *see* Mak Dep. Tr. at 136:11-14 & Ex. 4 at 352-53, 40 units of Office
 XP, *see* Mak Dep. Tr. at 141:16-24 & Ex. 4 at 356, 500 units of Office XP, *see* Mak Dep. Tr. at 143:1-20 & Ex.
 4 at 362-63, 600 units of Office XP, *see* Mak Dep. Tr. Ex. 4 at 365, 60 units of Office XP, *see* Mak Dep. Tr. at
 145:19-21 & Ex. 4 at 500, 40 units of Office XP, *see* Mak Dep. Tr. Ex. 4 at 501, 30 units of Office XP, *see* Mak
 Dep. Tr. at 146:21-147:2 & Ex. 4 at 503, and 467 units of Office XP, *see* Mak Dep. Tr. Ex. 4 at 620.

1 the Surplus Computers Defendants ever provide their customers with copies of the Volume
 2 License Agreement referenced on the face of each Student Media CD-ROM. *Id.* at 97:18-20
 3 & Ex. 2.

4
 5 **D. Mr. Mak's Personal Participation In Student Media Trafficking And Direction
 And Control Over Surplus Computers.**

6 Mr. Mak both personally participated in the acquisition and distribution of infringing
 7 Microsoft Student Media software *and* directed and controlled *every aspect* of Surplus
 8 Computers' acquisition and distribution of that infringing software.

9 Mr. Mak personally orchestrated Surplus Computers' acquisition of Microsoft Student
 10 Media software. Mak Dep. Tr. at 100:8-10, 118:15-17. Numerous of the Surplus Computers
 11 purchase orders for Microsoft Student Media or "NFR" software indicate that "MM" ordered
 12 the software, which Mr. Mak testified refers to him as the purchaser. *Id.* at 131:23-132:6,
 13 138:23-139:3. Indeed Mr. Mak admits that he personally signed many purchase orders for
 14 Microsoft software, including Student Media software. *See* Mak Dep. Tr. at 134:19-22 & Ex.
 15 4 at 349, Mak Dep. Tr. at 138:18-20 & Ex. 4 at 353, Mak Dep. Tr. at 142:11-13 & Ex. 4 at
 16 358, Mak Dep. Tr. at 143:23-24 & Ex. 4 at 363, Mak Dep. Tr. at 147:10-12 & Ex. 4 at 619;
 17 Mak Dep. Tr. at 150:6-8 & Ex. 4 at 175, Mak Dep. Tr. at 155:16-19 & Ex. 4 at 211, Mak Dep.
 18 Tr. at 155:20-22 & Ex. 4 at 227, Mak Dep. Tr. at 155:23-156:1 & Ex. 4 at 139. His signature
 19 appears on nearly 150 additional purchase orders for Microsoft products. Johnson Decl. ¶ 3.

20
 21 Mr. Mak also directed every aspect of Surplus Computers. In 1997 Mak started his
 22 "own company," the Intrax Group, Inc., which now does business as Surplus Computers.
 23 Mak Dep. Tr. at 36:5-9. Mr. Mak owns 70% of Intrax (the remaining 30% is owned by his
 24 brother). *Id.* at 58:7-9. Mr. Mak is the President of Intrax and one of two board members of
 25 the company (the other is his brother). *Id.* at 60:1-5, 60:25-61:2. Mr. Mak controlled the
 26 activities of every single Intrax employee he identified. *Id.* at 63:13-21, 66:4-7, 67:16-18,
 27 69:5-9, 71:21-25, 73:12-16, 74:12-16, 77:17-19, 78:20-24, 80:2-4, 82:5-9. Mr. Mak had the
 28 ability to control and has maintained Surplus Computers' website,

1 www.surpluscomputers.com. *Id.* at 82:1-11, 84:25-85:5. Indeed, Mr. Mak directed that
 2 Microsoft software, including the Student Media software at issue in this case, be offered for
 3 sale on the Surplus Computers website. *Id.* at 85:6-22.

4 As President, Director, and majority owner of the Intrax Group, Mak's financial well
 5 being is linked directly to Intrax. Mr. Mak testified that if the company made more money, he
 6 would make more money. *Id.* at 157:2-5. His earnings are tied to Intrax's earnings. *Id.* at
 7 158:21-24. Indeed, Mak has been paid bonuses by Intrax – bonuses that are distributed at the
 8 sole discretion of the Board of Directors, which consists of him and his brother. *Id.* at 158:25-
 9 159:7, 159:14-16.

10 IV. ARGUMENT

11 A. Standard.

12 Summary judgment is appropriate where, as here, there are no genuine issues of
 13 material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ.
 14 P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986);
 15 *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 983 (C.D. Cal. 2006). Cases such
 16 as this one, where there is no real dispute that defendant engaged in infringing activity, are
 17 particularly well suited for summary judgment. *See, e.g., Microsoft Corp. v. E & M Internet*
 18 *Bookstore, Inc.*, 2008 WL 191346 at *2 (N.D. Cal. Jan. 22, 2008); *Microsoft Corp. v. Sellers*,
 19 411 F. Supp. 2d 913, 918 (E.D. Tenn. 2006); *Microsoft Corp. v. Logical Choice Computers*,
 20 2001 WL 58950 at *8 (N.D. Ill. June 22, 2001); *Microsoft Corp. v. Compusource Distrib.,*
 21 *Inc.*, 115 F. Supp. 2d 800, 805 (E.D. Mich. 2000); *Microsoft Corp. v. Grey Computer*, 910 F.
 22 Supp. 1077, 1084 (D. Md. 1995).

24 B. Microsoft Is Entitled To Judgment As A Matter Of Law.

25 The Copyright Act provides the copyright owner with a number of rights, including
 26 the exclusive right of distribution. *See* 17 U.S.C. § 106(3). Additionally, the Copyright Act
 27 provides that it is an unlawful infringement of a copyright owner's rights to import into the
 28

1 United States copyrighted works acquired abroad without the copyright owner's authority.
 2 See 17 U.S.C. § 602(a).⁷

3 To establish its claim for copyright infringement, Microsoft need only show (1) that it
 4 owns valid copyrights in the works at issue, and (2) that Mr. Mak encroached upon
 5 Microsoft's exclusive rights under the Copyright Act. See 17 U.S.C. § 501; *Feist*
 6 *Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Entertainment Research*
 7 *Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997). Mr. Mak's
 8 knowledge or intent is irrelevant to his liability for copyright infringement.⁸ See 17 U.S.C.
 9 § 501(a); *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198-99, 51 S. Ct. 410, 412, 75
 10 L.Ed. 971 (1931); see also *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807 F.2d
 11 1110, 1113 (2d Cir. 1986) ("Even an innocent infringer is liable for infringement."); *ICG-*
 12 *Internet Commerce Group, Inc. v. Wolf*, 519 F. Supp. 2d 1014, 1019 (D. Ariz. 2007) ("In
 13 actions for [17 U.S.C. § 501] copyright infringement . . . the innocent intent of the Defendant
 14 _____

15 ⁷ Federal district courts have found that Microsoft is entitled to summary judgment or a preliminary injunction in
 16 similar factual circumstances. For example, in *Microsoft v. EEE Business Inc, et al.*, No. C 07-01839 JSW (N.D.
 17 Cal.), the Honorable Jeffrey White, United States District Court Judge, awarded Microsoft summary judgment
 18 on its copyright infringement and infringing importation of copyrighted works claims. See Johnson Decl. Ex. 5.
 19 In that case, the defendant admitted (by failure to answer requests for admissions) that she had distributed the
 20 software Microsoft acquired by test purchase (just as the evidence here conclusively demonstrates). The court
 21 found that "[t]his distribution of [Student Media] software without authorization plainly violates Microsoft's
 22 exclusive right to distribution under 17 U.S.C. § 501." *Id.* Ex. 5 at 9. The court further found that "Defendants'
 23 importation to the United States of software manufactured and licensed for exclusive use abroad is a plain
 24 violation of 17 U.S.C. § 602(a)." *Id.*

25 Similarly, in *Microsoft Corp. v. Global Online Distribution, LLC, et al.*, No. 2:07-cv-420 (D. Nev.), the
 26 Honorable Robert C. Jones, United States District Court Judge, denied Defendants' motion for summary
 27 judgment on Microsoft's copyright infringement and infringing importation claims (Dkt. # 68) and granted, on
 28 grounds of 17 U.S.C. § 602(a), Microsoft's motion for summary judgment as to defendants' liability (Dkt. # 71).
 See Johnson Decl. Ex. 6 (the Court's ruling is reflected in the Minutes of Proceedings; the Court is presently
 considering the form of the order to be entered).

Finally, in *Microsoft Corp. v. Technology Enterprises, LLC, et al.*, No. 06-CIV-22880-
 HOEVELER/BROWN (S.D. Fla.), the Honorable William M. Hoeveler, United States District Court Judge,
 granted Microsoft's motion for preliminary injunction enjoining the defendants from distributing Microsoft
 Student Media software and from importing Microsoft software manufactured abroad for exclusive distribution
 outside the United States. See Johnson Decl. Ex. 7.

⁸ A court may, however, consider a party's state of mind in determining whether to enhance statutory damages or
 to award attorney's fees. See 17 U.S.C. § 504(c)(2). At trial or on subsequent motion, Microsoft will offer
 significant evidence that statutory damages, should Microsoft elect them, should be enhanced and that Microsoft
 is entitled to attorney's fees.

is not a defense to a finding of liability.”); *UMG Recordings, Inc. v. Disco Azteca Distribs., Inc.*, 446 F. Supp. 2d 1164, 1172 (E.D. Cal. 2006) (copyright infringement does not require proof of a defendant’s intent to infringe); *Educational Testing Service v. Simon*, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (copyright infringement “is a strict liability tort”); *see also Microsoft Corp. v. Grey Computer*, 910 F. Supp. 1077, 1083 (D. Md. 1995) (neither lack of knowledge nor lack of intent are defenses to a claim of copyright infringement).

Microsoft unquestionably owns valid copyrights of the works at issue. Hawkes Decl. ¶ 15. As set forth below, Mr. Mak violated Microsoft’s rights under the Copyright Act by distributing Microsoft Student Media software to persons or entities other than qualified educational users in violation of Microsoft’s exclusive right of distribution under the Copyright Act. Mr. Mak is also liable for unauthorized importation of copyrighted works in violation of 17 U.S.C. § 602(a) for his distribution of Microsoft software manufactured abroad that is licensed for exclusive distribution to and use by qualified educational users abroad.

1. Unauthorized Distribution Of Microsoft Student Media Software.

The Surplus Computers Defendants’ distribution of Microsoft Student Media software to other than qualified educational users violates Microsoft’s exclusive right of distribution under the Copyright Act. *See* 17 U.S.C. §§ 106(3), 501(a). Test purchases reveal the Surplus Computers Defendants’ repeated distribution of Microsoft Student Media software – even after they were warned to cease such infringing conduct. Hawkes Decl. ¶¶ 8-13. Mr. Mak admitted that the Surplus Computers Defendants trafficked in **at least 2,895 units of Microsoft Student Media software.**⁹ Additionally, Mr. Mak admitted that the Surplus Computers Defendants trafficked in **at least an additional 1,754 units of Microsoft software** that was “NFR” (not for resale) software, and may have been Student Media.¹⁰ “The majority” of Microsoft “NFR” software sold by the Surplus Computers Defendants was

⁹ *See supra* note 5.

¹⁰ *See supra* note 6.

1 Student Media. Mak Dep. Tr. at 131:20-22. By Mr. Mak's own admission, the Surplus
2 Computers Defendants "sold Student Media." *Id.* at 48:20-22; *see also id.* at 51:2-11; 111:22-
3 112:2.

4 This Student Media software was plainly marked as not for resale. Remick Decl. ¶ 9
5 & Ex. 1; Mak Dep. Tr. Ex. 2 The Surplus Computers Defendants did nothing to qualify
6 customers as licensed to use the Student Media software, nor did they provide their customers
7 with copies of the Volume License Agreement that governed distribution and use of the
8 software. Mak Dep. Tr. at 96:12-18; 97:18-20 & Ex. 2. The Surplus Computers Defendants
9 distributed this special Student Media software without authorization from Microsoft, and
10 without qualifying end users consistent with the academic volume licensing programs under
11 which Student Media is distributed. Remick Decl. ¶ 10. The Surplus Computers Defendants
12 simply do not have the right to sell Microsoft software because they cannot obtain rights
13 beyond those granted in the license:
14

15 "[E]ven an unwitting purchaser who buys a copy in the secondary market can
16 be held liable for infringement if the copy was not the subject of a first sale by
17 the copyright holder." *See American Int'l Pictures, Inc. v. Foreman*, 576 F.2d
661, 664 (5th Cir. 1978). "Thus unless title to the copy passes through a first
sale by the copyright holder, subsequent sales do not confer good title." *Id.*

18 *Novell, Inc. v. Unicom Sales, Inc.*, 2004 WL 1839117, at *13 (N.D. Cal. 2004); *see also*
19 *Microsoft Corp. v. Harmony Comps. & Elecs.*, 846 F. Supp. 208, 212 (E.D.N.Y. 1994)
20 (same).

21 Should Mr. Mak assert a First Sale Defense to Microsoft's copyright infringement
22 claim here, that defense will fail because the Microsoft software at issue is distributed by
23 license, not sale. Remick Decl. ¶¶ 5-9; *see also Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84
24 F. Supp. 2d 1086, 1089 (N.D. Cal. 2000) (First Sale Defense applies only when there has been
25 "an actual sale"); *Wall Data Inc. v. L.A. County Sheriff's Dep't*, 447 F.2d 769, 785 n.9 (9th
26
27
28

1 Cir. 2006) (“[T]he first sale doctrine rarely applies in the software world because software is
2 rarely ‘sold.’”).¹¹

3 Mr. Mak’s business model was to (1) obtain Microsoft Student Media software
4 manufactured outside the United States and intended for (and exclusively licensed for)
5 distribution to schools in developing countries at a fraction of the cost of a retail version of the
6 same software, and (2) sell the Student Media software at a profit to other individuals and
7 entities, irrespective of the terms of the applicable academic licenses. Indeed, this is
8 demonstrated by the Surplus Computers Defendants’ offer of Microsoft Windows XP
9 Professional x64 edition for \$27.99, which they advertised at a massive discount off what they
10 represented as the regular price of \$299.99. *See* Mak Dep. Tr. 93:1-22 & Ex. 3 at 13.

11 **2. Violation Of 17 U.S.C. § 602(a).**

12 The Surplus Computers Defendants’ distribution of Microsoft software manufactured
13 and licensed for distribution abroad violates Microsoft’s rights under the Copyright Act to
14 control importation of copyrighted works manufactured and intended for use abroad. *See* 17
15 U.S.C. § 602(a) (“Importation into the United States, without the authority of the owner of
16 copyright under this title, of copies or phonorecords of a work that have been acquired outside
17 the United States is an infringement of the exclusive right to distribute copies or phonorecords
18 under section 106, actionable under section 501.”). All of the Student Media software
19 obtained through test purchases was manufactured by a third party in Ireland or Germany and
20 licensed for use by students abroad – *not* for students in North America. Hawkes Decl. ¶¶ 8-
21 10, 12-13; Remick Decl. ¶¶ 7-8. The Surplus Computers Defendants were not authorized by
22 Microsoft to import or distribute in the United States Microsoft software licensed only for
23 distribution outside the United States. Remick Decl. ¶¶ 10-11.

25 ¹¹ Even without this evidence that Microsoft’s software is licensed and not sold, Mr. Mak would bear the burden
26 of proving an “actual sale” and other requirements of that defense. *Microsoft Corp. v. Harmony Computers &*
27 *Elects., Inc.*, 846 F. Supp. 208, 212 (E.D.N.Y. 1994); *MapInfo Corp. v. Spatial Re-Engineering Consultants*,
28 2004 WL 26350, at *3 (N.D.N.Y. 2004); *see also Novell, Inc. v. Unicom Sales, Inc.*, 2004 WL 1839117, at *8
(N.D. Cal. 2004) (“Because the defendant ‘clearly has the particular knowledge of how possession of the
particular copy was acquired,’ the defendant has the burden of proving the applicability of the first sale
doctrine.”) (quoting 17 U.S.C. § 109, Historical Note).

1 Importation to the United States of this software, which is manufactured and licensed
2 for exclusive use abroad, plainly violates 17 U.S.C. § 602(a). That the Surplus Computers
3 Defendants may have obtained most (or even all) of this software from suppliers in the United
4 States does not nullify their liability under Section 602(a) of the Copyright Act. *See Parfums*
5 *Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 482 (9th Cir. 1994) (“[T]he purchaser of
6 illegally imported copies has no more authority to distribute copies than does the original
7 importer.”).

8 If Mr. Mak attempts to assert a First Sale Defense (which he cannot because the
9 Microsoft software at issue here is licensed and not sold, as described above), that defense
10 will not shield his distribution in the United States of Microsoft Student Media software from
11 abroad. The First Sale Defense simply does not apply to copyrighted works manufactured
12 abroad, intended for distribution abroad, and imported into the United States without the
13 copyright owner’s authorization, even if the copyrighted works were “sold.” *See Swatch S.A.*
14 *v. New City, Inc.*, 454 F. Supp. 2d 1245, 1253-55 (S.D. Fla. 2006); *Parfums Givenchy, Inc. v.*
15 *Drug Emporium, Inc.*, 38 F.3d 477, 481-82 (9th Cir. 1994); *BMG Music v. Perez*, 952 F.2d
16 318, 319 (9th Cir. 1991); *Columbia Broadcasting System, Inc. v. Scorpio Music Distribs.,*
17 *Inc.*, 569 F. Supp. 47, 49-50 (E.D. Pa. 1983), *aff’d without opinion*, 738 F.2d 424 (3d Cir.
18 1984).

19
20 *Quality King Distribs., Inc. v. L’anza Research Int’l, Inc.*, 523 U.S. 135 (1998), does
21 not stand against this authority. That case, in which the Court held that the first sale defense
22 did apply, involved the importation of copyrighted works that originally had been
23 manufactured *in the United States*. *See Quality King*, 523 U.S. at 154 (Ginsburg, J.,
24 concurring) (“This case involves a ‘round trip’ journey, travel of the copies in question from
25 the United States to places abroad, then back again. I join the Court’s opinion recognizing
26 that we do not today resolve cases in which the allegedly infringing imports were
27 manufactured abroad.”).

1 Indeed, a leading commentator has recognized that *Scorpio*, cited above, “probably
2 represented the best construction” of the Copyright Act with respect to 17 U.S.C. § 602(a) and
3 the first sale defense, and therefore the Copyright Act “should still be interpreted to bar the
4 importation of gray market goods that have been manufactured abroad.” 2 Melville B.
5 Nimmer and David Nimmer, *Nimmer on Copyright* § 8.12[B][6] (2006); *see also Swatch*, 454
6 F. Supp. at 1254 (recognizing that under *Quality King*, first sale doctrine applies only to
7 copies first sold in the United States, not those manufactured and first sold abroad).

8 Nimmer is not the only authority to have reached this conclusion. Federal courts have
9 determined that post-*Quality King* the First Sale Defense remains inapplicable to copyrighted
10 works manufactured and sold abroad. In *Swatch S.A. v. New City, Inc.*, 454 F. Supp. 2d 1245
11 (S.D. Fla. 2006), Swatch sued New City, an unauthorized importer of copyrighted Swatch
12 watches, for violation of 17 U.S.C. § 602(a). Just as Microsoft anticipates Mr. Mak will
13 assert here, New City argued that the First Sale Defense barred Swatch’s unauthorized
14 importation claim. The *Swatch* Court found that New City’s argument was based on a
15 misreading of *Quality King*:

16 § 109(a) [the First Sale Defense] only protects resales of works “lawfully made
17 under this title,” which means copyrighted works legally made and sold in the
18 United States. . . . Thus, in *Quality King*, § 109(a) protected the unauthorized
19 importation of copyrighted goods imported because the goods were made and
20 first sold in the United States. Had the goods not been manufactured
21 domestically, § 109(a) would not have applied.

22 *Swatch*, 454 F. Supp. 2d at 1254 (citation omitted). Because the Swatch watches were
23 manufactured and first sold abroad, the court found that New City’s importation of those
24 watches violated Swatch’s right to prevent their importation under Section 602(a) of the
25 Copyright Act. *Id.* at 1254-55; *see also UMG Recordings, Inc. v. Norwalk Distribs., Inc.*,
26 2003 WL 22722410, at *3-*4 (C.D. Cal. 2003) (rejecting First Sale Defense to 17 U.S.C. §
27 602(a) claim for works manufactured abroad). In short, “[t]he first sale doctrine in 17 U.S.C.
28 § 109(a) does not . . . provide a defense to infringement under 17 U.S.C. § 602(a) for goods
manufactured abroad.” *BMG Music v. Perez*, 952 F.2d 318, 319 (9th Cir. 1991).

1 Indeed, in similar cases against other distributors and importers of Microsoft Student
2 Media software manufactured and licensed for use abroad, federal courts have found that such
3 conducts violates 17 U.S.C. § 602(a).¹²

4 **C. Mr. Mak Is Individually Liable.**

5 **1. Mr. Mak Is Directly Liable.**

6 An individual who participates in copyright infringement in this manner is personally
7 liable for such infringement. *See, e.g., Playboy Enters., Inc. v. Starware Publ'g Corp.*, 900 F.
8 Supp. 438, 441-42 (S.D. Fla. 1995). Moreover, “[i]t is well established that a corporate
9 officer will be liable as a joint tortfeasor with the corporation in a copyright infringement case
10 where the officer was the dominant influence in the corporation, and determined the policies
11 which resulted in the infringement.” *Sailor Music v. Mai Kai of Concord, Inc.*, 640 F. Supp.
12 629, 633 (D.N.H. 1986); *see also Foreverendeavor Music, Inc. v. S.M.B., Inc.*, 701 F. Supp.
13 791, 793-94 (W.D. Wash. 1988) (finding individual liable for copyright infringement taking
14 place at restaurant where he was the president of the corporation that owned the restaurant,
15 where he and members of his immediate family were owners of the corporation, and where he
16 was responsible for management of restaurant).

17 The evidence here is overwhelming and uncontroverted that Mr. Mak personally
18 participated in the Surplus Computers Defendants’ infringing conduct, and is therefore
19 personally liable for that infringement. Mr. Mak personally arranged Surplus Computers’
20 acquisition of Microsoft Student Media software. Mak Dep. Tr. 100:8-10, 118:15-17.
21 Numerous of Surplus Computers’ purchase orders, including purchase orders for Microsoft
22 Student Media software, list “MM” as the buyer, which Mr. Mak testified refers to him.
23 131:23-132:6; 138:23-139:3. Additionally, Mr. Mak’s signature is present on numerous
24 purchase orders, including purchase orders for Microsoft Student Media software. *See* Mak
25 Dep. Tr. at 134:19-22 & Ex. 4 at 349, Mak Dep. Tr. at 138:18-20 & Ex. 4 at 353, Mak Dep.
26 Tr. at 142:11-13 & Ex. 4 at 358, Mak Dep. Tr. at 143:23-24 & Ex. 4 at 363, Mak Dep. Tr. at
27

28 ¹² *See supra* note 7.

1 147:10-12 & Ex. 4 at 619; Mak Dep. Tr. at 150:6-8 & Ex. 4 at 175, Mak Dep. Tr. at 155:16-19
 2 & Ex. 4 at 211, Mak Dep. Tr. at 155:20-22 & Ex. 4 at 227, Mak Dep. Tr. at 155:23-156:1 &
 3 Ex. 4 at 139; *see also* Johnson Decl. ¶ 3. Finally, Mak directed that Microsoft software,
 4 including Student Media software, be offered for sale on the Surplus Computers Defendants'
 5 website. Mak Dep. Tr. at 85:6-22.

6 Mr. Mak could not be more directly involved in the infringement of Microsoft's
 7 copyrights described in this memorandum and the supporting declarations. On this record, he
 8 should be found directly liable for copyright infringement.

9 **2. Mr. Mak Is Contributorily And Vicariously Liable.**

10 An individual may be vicariously liable for copyright infringement if he had the right
 11 and ability to supervise the infringing activity and also had a direct financial interest in such
 12 activities. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996).
 13 Additionally, "[o]ne who, with knowledge of the infringing activity, induces, causes or
 14 materially contributes to the infringing conduct of another, may be held liable as a
 15 'contributory' infringer." *Fonovisa*, 76 F.3d at 264 (quoting *Gershwin Publishing Corp. v.*
 16 *Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). On the facts
 17 established here, even if the Court concludes that Mr. Mak is not directly liable for copyright
 18 infringement (which the undisputed facts demonstrate he is), Mr. Mak is plainly both
 19 contributorily and vicariously liable for Surplus Computers' copyright infringement.
 20

21 As described above, Mr. Mak himself acquired Microsoft Student Media software for
 22 Surplus Computers and directed that it be offered for sale on the Surplus Computers website.
 23 *See* Section VI.C.1, *supra*. Moreover, Mr. Mak was aware of the licensing restrictions on this
 24 software, yet actively participated in and encouraged its distribution without even attempting
 25 to qualify customers as licensed to use this special educational program software. Mak Dep.
 26 Tr. 96:12-18, 98:7-16. Mak is therefore contributorily liable for Surplus Computers'
 27 infringement. *See Fonovisa*, 76 F.3d at 264.
 28

1 Mr. Mak is also vicariously liable. He had the ability to control the activities of *all* of
 2 Intrax's employees. Mak Dep. Tr. at 63:13-21, 66:4-7, 67:16-18, 69:5-9, 71:21-25, 73:12-16,
 3 74:12-16, 77:17-19, 78:20-24, 80:2-4, 82:5-9. As President and one of two board members,
 4 he had the ability to direct Surplus Computers' business, and indeed did direct that business.
 5 *Id.* at 60:1-5, 60:25-61:2. Mr. Mak controlled the content of the Surplus Computers website,
 6 and directed that Microsoft software, including Student Media, be offered for sale on it. *Id.* at
 7 82:1-11, 84:25-85:5, 85:6-22. As 70% owner of Intrax, Mak also had a direct financial
 8 interest in Intrax's distribution of Microsoft Student Media software. *Id.* at 58:7-9. Indeed,
 9 Mr. Mak testified that if Intrax made more money, he would make more money. *Id.* at 157:2-
 10 5. His earnings were tied to Intrax's financial performance. *Id.* at 158:21-24. And as one of
 11 two members of the Board of Directors (the other being his brother), Mr. Mak determined his
 12 own award of bonuses. *Id.* at 158:25-159:7, 159:14-16. Mr. Mak is plainly vicariously liable
 13 for Surplus Computers' infringement. *Fonovisa*, 76 F.3d at 262.

14 **D. Microsoft Is Entitled To A Permanent Injunction.**

15 "When a copyright plaintiff has established a threat of continuing infringement, he is
 16 entitled to an injunction." *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir.
 17 1994); *see also Arista Records LLC v. Ibanez*, 2008 WL 65397 at *2 (S.D. Cal. Jan. 4, 2008)
 18 (showing of copyright infringement liability and the threat of future violations is sufficient to
 19 warrant a permanent injunction). "Generally, it would appear to be an abuse of discretion to
 20 deny a permanent injunction where liability has been established and there is a threat of
 21 continuing infringement." *Walt Disney Co. v. Powell*, 897 F.2d 565, 567-68 (D.C. Cir. 1990).
 22 Moreover, because Mr. Mak's infringement of Microsoft's rights is beyond dispute, Microsoft
 23 is justified in inferring a threat of future harm. *See, e.g., id.* at 568 (defendant argued that he
 24 voluntarily ceased infringement, but trial court was justified in finding that defendant's
 25 reformation resulted from risk of legal exposure and it was not unlikely that defendant would
 26 attempt to infringe plaintiff's copyrights in the future). This is particularly true where, as
 27 here, Mr. Mak previously has been warned by Microsoft regarding his and his company's
 28

1 infringing distribution of Microsoft products, but nonetheless continued his infringing
2 activities.

3 A permanent injunction prohibiting further infringement will protect Microsoft's
4 intellectual property rights without causing Mr. Mak any harm. And, as in *Columbia Pictures*
5 *Indus., Inc. v. T & F Enters. Inc.*, 68 F. Supp. 2d 833 (E.D. Mich. 1999), "given the
6 magnitude of Defendants' infringing activities and the relative ease with which such
7 infringement can be perpetrated," it is appropriate to infer a substantial threat of ongoing harm
8 exists, and to grant a permanent injunction. 68 F. Supp. 2d at 841. Accordingly, Microsoft
9 asks the Court to enter the accompanying proposed permanent injunction to prevent any
10 future violation of Microsoft's copyrights.

11 V. CONCLUSION

12 Mr. Mak personally participated in and/or directed the trafficking and distribution of
13 Microsoft Student Media software that was manufactured abroad for exclusive use and
14 distribution by educational users abroad. These activities constitute copyright infringement in
15 violation of 17 U.S.C. § 501 and in violation of 17 U.S.C. § 602(a). The Court should grant
16 Microsoft summary judgment in its favor on those claims.
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MICROSOFTS NOTICE AND MOTION FOR SUMMARY
JUDGMENT; MEMO. OF POINTS AND AUTHORITIES
NO. 07-CV-01840 - 21